IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Date of decision : December 14, 2006

Nachhattar Singh alias Rada ....Appellant

versus

State of Haryana ....Respondent

Coram: Hon'ble Mr. Justice Virender Singh

Present : Mr. G.S.Sidhu, Advocate for the appellant
Mr. Sunil Katyal, Deputy Advocate General, Haryana

Judgment

Nachhattar Singh alias Rada son of Kirpal Singh, presently confined in District Jail, Sirsa, after suffering conviction under section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'the Act'), vide impugned judgment of learned Additional Sessions Judge, Sirsa dated 24/26.5.2005, has preferred the instant appeal.

As per the prosecution case, the recovery allegedly effected from the appellant was of 55 kgs of poppy husk in two gunny bags, which he left at point-T of Jagmalwali in the area of village Asir and made good

his escape in front of SI Shiv Kumar, SO Police Station Kalanwali and other police officials who were present on patrol duty and going in a government vehicle. The recovery was effected in the presence of one independent witness, namely, Jagtar Singh. According to the case of the prosecution, two samples weighing 100 grams each were separated from both the gunny bags and on weighment along with gunny bags, the residue turned out to be 39 kgs 800 grams in one gunny bag and 14 kgs 800 grams in other gunny bag. All the requisite formalities of sealing the sample and the bulk were completed at the spot itself. A ruqa was served upon the accused and subsequently a formal FIR was registered in the concerned Police Station. A report under section 57 of the Act was also prepared. Rough site plan was also prepared by the Investigating Officer. Ultimately the appellant surrendered and was arrested on 19.1.2004 by ASI Tek Ram. On receipt of report of FSL and after completion of the investigation, challan was filed against the appellant. He was charged under section 15 of the Act by the learned trial court and ultimately stands convicted and sentenced as stated above for the said charge.

I have heard Mr. G.S.Sidhu, learned counsel for the appellant and Mr. Sunil Katyal, learned Deputy Advocate General, Haryana. With their assistance I have also gone through the entire record.

Mr. Sidhu has pointed out certain procedural flaws in the prosecution case, the effect thereof would be that the quantity allegedly

recovered from the appellant from two bags (containing different quantity in each bag) would not fall under the head 'commercial quantity'.

The first flaw projected by Mr. Sidhu is that total quantity in two bags was 55 kgs. One bag was containing 40 kgs of poppy husk and the other was containing 15 kgs of poppy husk. From both the bags, two samples of 100 grams each were extracted and the same were deposited with MHC Rampal on the same day. As per the affidavit of Constable Jai Singh PW4, only two samples were handed over to him for depositing it in the office of FSL for analysis. From this factual position, Mr. Sidhu wants to develop that it has not been made clear by the prosecution that the two samples which were actually sent to the Chemical Examiner were in fact representing both the bags from where the contraband was allegedly recovered. Two samples could also represent only one bag out of two and therefore, it was the duty of the Investigating Officer to give specific identification to two samples recovered from one bag and the other two samples recovered from the second bag. It has also not come in the statement of Investigating Officer that he had mixed the entire poppy husk in one bulk and then drawn four samples. Therefore, the ambiguity through out remains in this regard and there is every possibility that the two samples which were sent for analysis could be the representative sample of the bag which contained only 15 kgs of contraband. If the same rationale is applied to the other bag, still the quantity would be at the most of 40 kgs of poppy husk. So in both the situations, the quantity would fall under the head 'non-

commercial'.

The other flaw pointed out by Mr. Sidhu is that poppy husk contained in both the bags was weighed along with the bags and each bag roughly is of the weight of 2.5 kgs. In this eventuality also the quantity of the contraband would turn out to be 50 kgs after deducting the weight of the bag. Some margin of error in weighment is also to be extended in this case. Taking the case from that angle as well, it can be said that the recovery allegedly effected from the appellant was less than 50 kgs of poppy husk which would again fall under the head 'non-commercial quantity'.

Mr. Sidhu submits that the present case is covered by the Legislative change (Act 9 of 2001). In support of his aforesaid contentions, Mr. Sidhu relies upon a judgment of this Court rendered in **Gurlal Singh and ors. Vs State of Punjab** 2003(2) RCR (Criminal) 198 and another judgment rendered in **Sikander Singh vs State of Punjab** 2005(2) RCR (Criminal) 810 and prays only for reduction in the quantum of sentence. While praying for reduction in the quantum of sentence on both the counts, Mr. Sidhu submits that the appellant by now has undergone two years and eight months. He is not a previous convict. He had lost his parents. His wife and minor children are totally dependent upon him. At the time of alleged occurrence, he was of the age of about 30 years.

Mr. Katyal, learned State counsel has half-heartedly opposed the contentions of learned counsel for the appellant on merits. However,

with regard to quantum of the sentence, the learned State counsel submits that the sentence may be awarded to the appellant commensurating with the quantity recovered from him.

Although Mr. Sidhu has not assailed the impugned judgment on merits, so far as conviction under section 15 of the Act is concerned except for reduction in sentence part, yet being the Court of first appeal, I have gone through the entire evidence once again and am of the view that the conviction of the appellant under section 15 of the Act deserves to be upheld. Ordered accordingly.

The admitted position is that two samples weighing 100 grams from each bag were separated. To make it more clear, four samples were drawn in this case. As is clear from the statement of SI Shiv Kumar, the Investigating Officer that he had deposited all the samples with HC Rampal (MHC of the Malkhana) on 28.10.2003. Affidavit Ex. PA tendered by MHC Rampal PW3 indicates that on 28.10.2003, SI Shiv Kumar had deposited four samples with him out of which he had handed over two samples to Constable Jai Singh on 4.11.2003 for depositing the same in the office of FSL, Madhuban. Constable Jai Singh has also stated in his affidavit Ex. PB that he was given two samples for depositing the same with the Analyst. The report of the Chemical Examiner Ex. PG also talks about receipt of two samples for analysis. From the aforesaid factual position, what ambiguity remains is as to whether the two samples which were sent

for analysis were in fact the representative samples of each bag containing poppy husk. The admitted position is that the prosecution has not made this position clear and therefore there is every possibility that samples sent for analysis could be from either of the bag containing poppy husk. Therefore, I find substance in the submission advanced by Mr. Sidhu on this aspect. The judgment rendered by this Court in **Sikander Singh's** case (supra) clearly covers the case of the applicant in this regard.

I also find substance in the submission advanced by Mr. Sidhu with regard to other limb of arguments. There is no evidence on record that poppy husk was weighed after taking it out of the gunny bags. Rather SI Shiv Kumar has categorically stated that after extracting the sample, remaining poppy straw and the bags were weighed with the help of spring actuated balance. It was found 39 kgs 800 grams in one bag and in the other it was found 14 kgs 8000 grams including the weight of bag. From this it is clear that the poppy husk was weighed including the bags. Although no specific question has been put to the Investigating Officer with regard to each of the bag, it can be said to be about 2.5 kgs. The learned State counsel also very fairly admits that in any case it may not be less than 2 kgs. By giving all the allowance to the marginal error in the weighment including the weight of the bag, in my considered view, the poppy husk allegedly recovered from the appellant would not exceed 50 kgs at all. The judgment rendered in **Gurlal Singh's** case (supra) relied upon by Mr. Sidhu

comes to the rescue of the appellant on this aspect and it can comfortably be said that the contraband allegedly recovered from him would fall under the head 'non-commercial quantity'.

Taking into account the aforesaid flaws in the case of the prosecution and as per the Legislative change (Act 9 of 2001), less sentence can be imposed . Therefore, I intend to impose appropriate sentence in the case in hand. Mr. Sidhu has stated that the appellant by now has undergone two years and about eight months of his substantive sentence. He is also not a previous convict.

Keeping in view the entirety of facts, the ends of justice would be adequately met with if the substantive sentence already awarded by the learned trial court is reduced to three years and the sentence of fine is reduced to Rs 5000/- only, in default thereof, the appellant shall undergo RI for six months. Ordered accordingly.

The net result is that the instant appeal is dismissed so far as the conviction of the appellant under section 15 of the Act is concerned but for the modification in the quantum of sentence as indicated above.

All quarters concerned be informed.

(Virender Singh)
Judge

December 14, 2006
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